

No. 22443

In the  
UNITED STATES  
COURT OF APPEALS  
for the  
NINTH CIRCUIT

ALLSTATE INSURANCE COMPANY, )  
an Illinois corporation, )

Appellant, )

vs. )

NELSON CHRISTIAN DORR and )  
AEDA DORR, his wife, )  
surviving parents of FELIX )  
MATTHEW DORR, deceased, et al, )

Appellees. )

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BRIEF OF APPELLEES  
LUCIO M. LOMBARDO  
and  
BADGER MUTUAL INSURANCE COMPANY

McKESSON, RENAUD, COOK, MILLER  
& CORDOVA

J. Gordon Cook  
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Attorneys for Appellees Lombardo  
and Badger Mutual Insurance Co.



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Appellant's brief confuses substantive and procedural due process. Procedural due process relates to "notice and an opportunity to be heard and to defend in an orderly proceeding,"\* while substantive due

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\*Quotation from Phoenix Metals Corp. v. Roth, 79 Ariz. 106, 284 P.2d 645, as quoted in Sandoval v. Chenoweth, 102 Ariz. 241, 428 P.2d 98.





process

"is interpreted to mean that the state is without right to deprive a person of life, liberty or property by an act that has no reasonable relation to any proper governmental purpose, or which is so far beyond the necessity of the case as to be an arbitrary exercise of governmental powers. Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, 115 A.L.R. 1436. As applied to legislative enactments, due process of law means only that statutes shall be general in operation and affect the rights of all who should properly be brought within their provisions. Barrington v. Barrington, 206 Ala. 192, 89 So. 512, 17 A.L.R. 789."\*

The Arizona Supreme Court in Farmer v. Killingsworth, 102 Ariz. 44, 424 P.2d 172, in a highly analagous situation, has determined that § 28-1142, A.R.S. 1956, of the Arizona Financial Responsibility Act was not a violation of substantive due process because the legislation was not an unconstitutional discrimination between members of a class. Farmer said that

"the primary purpose of the Financial Responsibility Act is to prevent financial distress to persons involved in accidents on the highways

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\*Valley Nat'l Bank v. Glover, 62 Ariz. 538, 159 P.2d 292, 298-99.



with uninsured motorists. Schechter v. Killingsworth, 92 Ariz. 273, 380 P.2d 136 (1963). We stated in the same case that '\* \* \* the social objective of preventing financial hardship and possible reliance upon the welfare agencies of the state is a permissible goal of police power action'. 93 Ariz. at p. 281, 380 P.2d at p. 141." 424 P.2d at 175.

Two recent Arizona cases have interpreted procedural due process as it applies to the statute in question, § 28-1170, A.R.S. 1956, to wit, Carpenter v. Superior Court, 101 Ariz. 565, 422 P.2d 129, and Sandoval v. Chenoweth, 102 Ariz. 241, 428 P.2d 98. In Carpenter the aggrieved insurance company, referred to as Zurich, contended that the judgment against it was in violation of due process because it

"received no notice of the application for default judgment, and therefore '[n]o notice or opportunity to be heard on the question of liability or damages was given to Zurich.\* \* \*'" 422 P.2d at 135.

The Court disposed of this procedural due process argument by stating in essence that (1) Zurich acted at its peril in withdrawing its attorneys as counsel; (2) Phoenix Metals Corp. v. Roth, supra,\* is not on

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\*Relied upon by appellant herein.



point because

"Zurich is not 'the party against whom judgment by default is sought' as was the defendant in the Roth case." 422 P.2d at 136.

In Sandoval, the same attorneys as represent appellant herein contended that the appellant insurance company, called Financial, had been denied due process. In spite of the fact that Financial, like Zurich in Carpenter, was not the party against whom judgment by default\* was sought, the Arizona Supreme Court did discuss whether or not procedural due process had been satisfied. Sandoval stated that Phoenix Metals Corp. v. Roth, supra, set forth the elements of due process in regard to notice and in part quoted the same portion of Roth that is quoted in page one of this brief. Financial's counsel first learned of the default judgment on May 29, 1961, but did not file a motion to set aside the default until August 9, 1961, more than nine weeks later. The Arizona Supreme Court pointed out that the trial court could have found that the motion

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\*Default was against Financial's assured who apparently did not notify Financial of the complaint until after default and default judgment.



to set aside the default judgment was not made within a reasonable time, consequently the Supreme Court could not say that the trial court "abused its discretion in failing to grant the motion." The issue was concluded by the following statement:

"In light of the foregoing facts, Financial has not been deprived of its constitutional right of due process of law, as the Financial Responsibility Law was in effect at the time of the issuance of this policy, and its counterpart in California had been interpreted in accord with our subsequent decision in *Mayflower. Wildman v. Government Employees Ins. Co.*, supra." 428 P.2d at 102-03.

The above quoted statements mean that there was no denial of procedural due process; in addition, substantive due process was disposed of since the Arizona Financial Responsibility Law (as in this case) was in effect at the time of the issuance of the policy.

The due process aspect of Carpenter and Sandoval was procedural, although the above quotation from Sandoval did make an apparent oblique comment as to substantive due process. The above analyzation of these cases shows that such reliance by appellant upon these cases is not justified. There is no issue herein as to notice or an opportunity to be heard. Rather, the





thrust of appellant's argument is substantive due process.\* The issue of substantive due process is disposed of by Farmer v. Killingsworth, supra, and public policy statements of the Arizona Supreme Court in Jenkins v. Mayflower Ins. Exch., 93 Ariz. 287, 380 P.2d 145, and Dairyland Mut. Ins. Co. v. Andersen, 102 Ariz. 515, 433 P.2d 963.\*\*

Respectfully submitted,

McKESSON, RENAUD, COOK, MILLER & CORDOVA

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\*Appellant argues "due process when applied to substantive rights," p. 7, Appellant's Opening Brief, that a regulation must be reasonably necessary to secure the general welfare of the community, p. 7, Appellant's Opening Brief, that due process requires reasonable exercise of police power, p. 8, Appellant's Opening Brief, that the Fourteenth Amendment, due process, includes the right to freely contract without unreasonable restraint, p. 10, Appellant's Opening Brief.

\*\*The Arizona Supreme Court said as follows in Dairyland as to the public policy of the Sandoval and subsequent judicial interpretations of § 28-1170, A.R.S. 1956: "It is neither desirable nor advisable to engraft exceptions upon statutory pronouncement now so firmly recognized as the public policy of this jurisdiction." 433 P.2d at 965. Sandoval and Dairyland were again affirmed on May 8, 1968 by the Arizona Supreme Court in the yet unreported decision of Harleysville Mut. Ins. Co. v. Clayton, No. 8607.



I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. Gordon Cook

